97-74 JUL 10 1997

No. OFFICE OF THE CLERK

In The
Supreme Court of The United States
October Term 1996

SALLY ANN VALOT,
JEAN HANSEN, ANNA D. ROOSA,
Petitioners,

v.

SOUTHEAST LOCAL SCHOOL
DISTRICT BOARDOF EDUCATION, ET AL.,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a public employer may refuse to employ an individual for the stated reason that the individual sought and received unemployment compensation benefits to which he was entitled under state law?

2. Whether an individual denied public employment for applying to a government agency for a statutory benefit has established a right of access claim under the Petition Clause?

3. Whether the Petition Clause, Due Process Clause or Equal Protection Clause to the United States Constitution are violated where a public employer refuses to rehire former employees for the stated reason that the former employees applied for unemployment compensation benefits during a break-in-service?

LIST OF PARTIES

The Appellants in the proceeding below were Sally Ann Valot, Jean Hansen and Anna D. Roosa. The Appellees in the proceeding below were the Southeast Local School District Board of Education and Kelly Westover, David Pettigrew, Charles Honeck, Russell McKenzie, Robert Hedrick and Terry Byers. There is no parent or subsidiary company of any party to be listed.

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Appendix A - Opinion of the United States Court of Appeals for the Sixth Circuit Dated March 6, 1997..... Apdx. A-1

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Appendix C - Memorandum Opinion and Order of the United States District Court for the Northern District of Ohio Filed February 28, 1995..... Apdx. C-1

PETITION FOR A WRIT OF CERTIORARI

Petitioners Sally Ann Valot, Jean Hansen, and Anna D. Roosa respectfully petition for a Writ of Certiorari to review the March 6, 1997 Opinion of the United States Court of Appeals for the Sixth Circuit, Appendix A, which affirmed the judgment entered by the United States District Court for the Northern District of Ohio, on February 28, 1995. Appendix C.

OPINIONS BELOW

The judgment of the United States District Court for the Northern District of Ohio, entered on February 28, 1995, Appendix C, is reported at 957 F.Supp. 991. The Opinion of the United States Court of Appeals for the Sixth Circuit entered on March 6, 1997, Appendix A, is reported at 107 F.3d 1220.

STATEMENT OF JURISDICTION

This Petition seeks review of an Opinion entered by the United States Court of Appeals for the Sixth Circuit on March 6, 1997. Appendix A. A petition for a rehearing filed by Petitioners was denied by the United States Court of Appeals for the Sixth Circuit on April 18, 1997. Appendix B.

Petitioners Sally Ann Valot, Jean Hansen and Anna D. Roosa seek to invoke the jurisdiction of this Court to review the Opinion of the United States Court of Appeals for the Sixth Circuit under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the Constitution states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The relevant portion of 42 U.S.C. Section 1983 states:

"Every person who, under color of statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

This action was commenced by Petitioners in the United States District Court for the Northern District of Ohio. The complaint alleged that Respondents Southeast Local School District Board of Education, and individual Board members and employees, violated Petitioners' rights under the Constitution of the United States. Jurisdiction was asserted under 42 U.S.C. Sections 1331 and 1343.

This action arose out of Respondent Board's refusal to reemploy Petitioners for the 1993-94 school year. The reason for the Board's decision was that Petitioners had previously

filed for and received unemployment compensation benefits to which they were entitled under Ohio law.

Prior to the summer of 1993, Petitioners Sally Ann Valot, Jean Hansen and Anna D. Roosa were employed as substitute school bus drivers in the Southeast Local School District. They were employed for several years under a series of nine month contracts which were issued by Respondent Board at the beginning of each school year. Petitioners were not employed during the summer months.

Though unemployed during the summer months, Petitioners did not receive unemployment compensation benefits prior to the summer of 1993. Petitioners applied for and received unemployment compensation benefits when their contract expired at the end of the 1992-93 school year. There is no dispute that Petitioners were entitled to those benefits under state law.

During their employment with Respondent Board, Petitioners were rehired on a yearly basis in accordance with the recommendation of the Superintendent of the School District. In the Fall of 1993, the Superintendent initially recommended that Petitioners be rehired for the 1993-94 school year. The Board voted to renew all the individuals that the Superintendent recommended for rehire except Petitioners. The stated reason for the Board's decision was that Petitioners filed for and received unemployment compensation benefits.

Respondents moved for a summary judgment. Respondents acknowledged that Petitioners were refused

employment because they received unemployment compensation benefits. Under state law, the Board had to pay these benefits. Though not disputing Petitioners' statutory right to unemployment compensation under Ohio law, Respondents cited the additional expense as justification for refusing to rehire Petitioners.

The District Court granted summary judgment dismissing Petitioners' complaint. On appeal to the United States Court of Appeals for the Sixth Circuit, a divided court affirmed.

REASONS FOR GRANTING THE WRIT

The court below ruled that Petitioners could be denied public employment because they received unemployment benefits to which they were entitled under state law. The court found no constitutional impediment to a public employer's conditioning public employment on the waiver of statutory rights. In so ruling, the court below rejected Petitioners' right-of-access, Due Process and Equal Protection claims. The appellate court's treatment of these significant constitutional provisions - which departs from the rulings of this Court and is in direct conflict with the decision of another circuit - merits this Court's review.

I. REVIEW IS APPROPRIATE TO RESOLVE A CONFLICT AMONG THE CIRCUITS WITH RESPECT TO THE SHOWING NECESSARY TO ESTABLISH A RIGHT OF ACCESS CLAIM UNDER THE PETITION CLAUSE.

This Court recognized that "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." Bill Johnson's Restaurants, Inc. v. National Labor Relations Board, 461 U.S. 731, 741 (1983). Further, the right of access is not limited to courts, but extends to administrative agencies. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). The court below acknowledged that the right of access applies to Petitioners' application for unemployment compensation benefits.

The right of access is meaningless if a citizen can be punished by the government for exercising that right. The court below agreed, explaining that "a claim of retaliation for exercise of the constitutional right of access is cognizable under § 1983." Apdx. A-11. Yet the court proceeded to affirm the dismissal of Petitioners' claim, even though there is no dispute that Petitioners were denied employment because they applied to a state administrative agency for unemployment compensation benefits.

The court ruled that the Petition Clause of the First Amendment "expressly protects conduct" similar to that involved here. Apdx. A-12. The court, recognizing a conflict among the circuits on this issue, continued that a claim under the Petition Clause "is subject to the same analysis applied to a claim arising under the Speech Clause." Apdx. A-12.

In applying a speech analysis, the court concluded that the application for unemployment compensation was not a matter of public concern and that the "right -of- access claim would fail when balanced against Defendants' interests in not rehiring them for seeking unemployment benefits." Apdx. A-14. These considerations were developed in speech cases and are simply not appropriate in evaluating Petitioners' right of access claim.

Dissenting Judge Merritt explained:

> "The petition clause should not be interpreted to permit retaliation for filing a legitimate unemployment compensation case anymore than it permits retaliation against individuals making legitimate claims for racial, gender or religious discrimination. We do not import the 'public concern' test into due process, equal protection or other constitutional claims. Why do so here?" Apdx. A-37, 38.

This Court's decision in California Motor Transport v. Trucking Unlimited, supra, was cited for the proposition that courts have recognized the right of access "[w]ithout engaging

in a 'matter of public concern' analysis..." Fuchilla v. Prockop, 682 F.Supp. 247, 262 (D.N.J. 1987).

In any event, the right of access involves a public forum - either a court or an administrative agency. The right to access a government forum is clearly a matter of public interest.

In applying the balancing test developed in speech cases to the petition claim, the court below cited Pickering v. Board of Educ. of Township High Sch. Dist. 205, 391 U.S. 563 (1968) and Connick v. Myers, 461 U.S. 138 (1983). The interest of the public employer recognized in Pickering and Connick was the interest of any employer in ensuring a harmonious workplace, and the concern that the employees' activities not undermine authority or cause discord with other workers. Such an interest is not remotely relevant here, illustrating the inappropriateness of engrafting concepts developed under the Speech Clause to claims under the Petition Clause. Clearly, "...the factors considered in an analysis under Connick...are not transferable to an analysis of an infringement of the right of access..." McCoy v. Goldin, 598 F.Supp. 310, 315 n. 4 (S.D.N.Y. 1984)

The decision below creates a direct conflict with the Third Circuit decision in San Filippo v. Bongiovanni, 30 F.3d 424 (3rd Cir. 1994). In that case, the appellate court concluded that a citizen could not be punished by the Government for asserting rights made available by the Government. In so ruling, the court expressly declined to

apply the analysis that governs speech claims. The court below acknowledged that its decision directly conflicted with the Third Circuit ruling in San Filippo. Apdx. A-13, 36.

The Third Circuit explained that if the right to petition is folded into the Speech Clause, "the petition clause of the first amendment would, for public employees seeking to vindicate their employee interests, be a trap for the unwary - and a dead letter." San Filippo v. Bongiovanni, supra at 442. The Third Circuit decision continued that the Petition Clause was "independent" and was never intended to be a "redundant appendage of the clause's guarantee freedom of speech and press." 30 F.3d at 442. See also, Shea, San Filippo v. Bongiovanni: The Public Concern Criteria and the Scope of the Modern Petition Right, 48 Vand.L.Rev. 1697 (1995). ("The Framers laid out the petition right alongside its first amendment counterparts as a separate textual guarantee. If the Framers had meant to include petitioning under the guarantee of free speech, they could easily have done so." 48 Vand.L.Rev. at 1732).

The court in San Filippo noted a dispute among the circuits on this issue. 30 F.3d at 440, n. 19. And the decision in San Filippo directly conflicts with the decision below. Review is appropriate to resolve the conflict among the circuits.

This Court has on rare occasions considered the constitutional right of access. In discussing whether there is

an "independent, non-derivative, federal constitutional right of access to the courts", Judge Posner reflected:

> "Although there is support in some decisions of the Supreme Court, notably California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510, 92 S.Ct. 609, 611, 30 L.Ed.2d 642 (1972), it does not appear that the Court has ever examined the question carefully." Pena v. Mattox, 84 F.3d 894, 903 (7th Cir. 1996).

This appeal affords an opportunity to consider the significant issue.

The context in which the issue arises invites this Court's consideration. There is no dispute that Petitioners were denied government employment because they applied for a statutory benefit. They were punished for filing a legitimate unemployment compensation claim authorized by state law. This is offensive and merits this Court's review.

II. THE COURT'S TREATMENT OF PETITIONERS' DUE PROCESS CLAIM CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

This Court has developed certain bedrock principles governing the Due Process provisions of the Constitution. The settled principles were ignored by the court below. The

resulting opinion deprived Petitioners of public employment because they exercised their constitutional and statutory rights.

A government employer "do[es] not constitutionally have the complete freedom of action enjoyed by a private employer." Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886, 898 (1961). In denying public employment, "there are some reasons upon which the government may not rely." Perry v. Sindermann, 408 U.S. 593, 597 (1972).

Petitioners were refused public employment because they received unemployment compensation benefits in accordance with Ohio law. The government may not rely on conduct authorized by law as the reason to refuse public employment.

In United States v. Goodwin, 457 U.S. 368 (1982), this Court stated that to "punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" 457 U.S. at 372 (citing Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978)). This Court continued that:

> "...while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right." 457 U.S. at 372.

This Court concluded that it is "patently unconstitutional" for the government "to pursue a course of action whose objective

is to penalize a person's reliance on his legal rights." 457 U.S. at 372, n. 4.

Petitioners here did nothing more than pursue their statutory right to receive unemployment compensation. In return for doing what the law permitted them to do, Petitioners became the victims of an act of retaliation designed solely to punish them for exercising a statutory right. As recognized in Goodwin, this is "patently unconstitutional."

The court below rejected Petitioners' Due Process claim in a way which conflicts with relevant decisions of this Court. In numerous respects, including the following, the appellate court's treatment of the Due Process issue disregarded the teachings of this Court.

This Court explained that "a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment." Abood v. Detroit Board of Education, 431 U.S. 209, 234 (1977). That is precisely what occurred here. Respondent Board conditioned reemployment on Petitioners' relinquishment of their First Amendment right to petition for unemployment compensation benefits.

Citing a series of prior decisions, this Court recently reaffirmed that "A State may not condition public employment on an employee's exercise of her or her First Amendment rights." O'Hare Truck Services, Inc. v. City of Northlake, 518 U.S. --, 135 L.Ed.2d 874, 880 (1996). This settled principle has been applied in cases where an individual has been denied

public employment for exercising various First Amendment rights, including speech (see, e.g., Pickering v. Board of Edn. of Township High Sch. Dist. 205, 391 U.S. 563 (1968)), association (see, e.g., Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990)), and religion (see, e.g., Torcaso v. Watkins, 367 U.S. 488 (1961)). No less protection should be provided an individual denied public employment because of the exercise of rights recognized under the Petition Clause.

Even though there is no right to public employment, an individual denied a position "may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms." Mt. Healthy School Dist. Bd. of Educ. v. Fred Doyle, 429 U.S. 274, 283-284 (1977). Here, Petitioners were denied employment for exercising the right of access, conduct protected by the Petition Clause of the First Amendment. As with other First Amendment rights, Petitioners cannot be refused public employment because they exercised rights conferred by the Petition Clause.

The Due Process Clause has long been the vehicle to afford relief from arbitrary government conduct. ("The touchstone of due process is protection of the individual against arbitrary action of government." Wolff v. McDonnell, 418 U.S. 539, 558 (1974)). This Court explained that "The Due Process Clause contains a substantive component that bars certain arbitrary, wrongful Government actions..." Zinermon v. Burch, 494 U.S. 113, 125 (1990).

In concurring below, Judge Ryan labeled substantive due process a "constitutional oxymoron" and criticized the "mess that has been made of this jurisprudence by a number of federal courts, including the Supreme Court." Apdx. A-31. Punishing a citizen for conduct which the government allows is "arbitrary" and clearly falls within the reach of substantive due process.

In rejecting Petitioners' right of access and Due Process claims, the court below concluded that Respondents acted in a reasonable manner. The court cited the School Board's interest in preserving funds that would be paid to successful unemployment compensation claimants. The court continued that the refusal to reemploy Petitioners would "send a message" to other employees and discourage applications for unemployment compensation benefits. Apdx. A-16.

The court below placed a price on Petitioners' right of access. Petitioners could receive unemployment compensation benefits in accordance with state law, but the acceptance of those benefits would result in the denial of public employment. Ignoring scores of decisions by this Court, the court below ruled that public employment could be conditioned on the waiver of constitutional and statutory rights.

While saving money might be a worthy government goal, "...the Constitution recognizes higher values than speed and efficiency." Fuentes v. Shevin, 407 U.S. 67, 90, (1972). This Court continued:

> "...one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." 407 U.S. at 90, n. 22.

Punishing an individual for exercising constitutional and statutory rights, even if done to save money, is unconstitutional under the Due Process Clause.

The court also accepted Respondents' explanation that refusing to hire Petitioners would discourage others from asserting their rights. This Court explained:

> "If a law has 'no other purpose...than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.' United States v. Jackson, 390 US 570, 581, 20 L Ed 2d 138, 147, 88 S Ct 1209 (1968)." Shapiro v. Thompson, 394 U.S. 618, 631 (1969).

The effort to discourage others from asserting their right to petition the state for unemployment compensation benefits is hardly a justification for refusing to rehire Petitioners.

The Due Process Clause prohibits the arbitrary exercise of power by the government. The ruling below that

the Constitution permits the government to punish a person for conduct which the law authorizes is plainly arbitrary.

The appellate court decision offends traditional notions of Due Process which have been developed by this Court. Review is appropriate.

III. THIS APPEAL RAISES IMPORTANT QUESTIONS OF FEDERAL LAW CONCERNING THE REACH OF THE EQUAL PROTECTION CLAUSE TO THE UNITED STATES CONSTITUTION.

The Superintendent of the school district initially recommended that Petitioners and certain other former employees be rehired. With the exception of Petitioners, the Board followed the Superintendent's recommendation. The stated reason for the different treatment was that Petitioners applied for unemployment compensation benefits.

This Court explained that government actions that "impinge on personal rights protected by the Constitution" are subject to "strict scrutiny" and will be upheld only if the actions "serve a compelling state interest." City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 440 (1985). The court below, finding no constitutional impediment to a public employer's refusal to rehire an employee for applying for a statutory benefit, declined to apply the strict scrutiny test. For the reasons explained above, the court's rejection of

the constitutional arguments was erroneous, and, as a result, the court did not apply the proper Equal Protection standard.

The court below proceeded to consider the Equal Protection arguments under the rationality standard. The court concluded that the Board action was "rationally related to a legitimate state interest." Apdx. A-19. This conclusion raises fundamental questions concerning the Equal Protection Clause.

The Equal Protection Clause "does not just mean treating identically situated persons identically." Esmail v. Macrane, 53 F.3d 176, 179 (7th Cir. 1995). The appellate court continued that the Equal Protection Clause is not limited,

> "to protecting members of identifiable groups. It has long been understood to provide a kind of last-ditch protection against governmental action wholly impossible to relate to legitimate governmental objectives." 53 F.3d at 180.

In Esmail, the court concluded that an applicant for a municipal license stated an equal protection claim by alleging that the denial was "the result solely of a vindictive campaign by the mayor." 53 F.3d at 179.

Like the plaintiff in Esmail, Petitioners were denied a government position. Petitioners' sin was daring to assert their rights under Ohio law. The Esmail court pointedly explained:

> "If the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court." 53 F.3d at 179.

Similarly, individuals punished for exercising their legal rights "ought to have a remedy in federal court."

The court in Esmail acknowledged that the appeal presented "an unusual kind of equal protection case, though not an unprecedented kind." 53 F.3d at 178. The court cited Supreme Court decisional law which considered whether the challenged state action was "arbitrary" or "irrational". Lindsey v. Normet, 405 U.S. 56, 79 (1972), U.S. Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 177 (1980). As is evident from the appellate court's opinion, the stated excuse for the Board's action - to save expenses - was arbitrary and irrational.

The appellate court considered both short-term and long-term expenses to the Board. The court below acknowledged that Petitioners "offered to pay back the benefits they received" and therefore "rehiring Plaintiffs would not have imposed short term costs on the Board..." Apdx. A-16, A-17. Any potential long-term exposure was foreclosed by a change in Board hiring policy. The court explained that after this incident occurred, the Board "changed their policies to ensure that all substitute employees had a reasonable assurance of employment for the following school year, which

made those employees ineligible for unemployment compensation under Ohio law." Apdx. A-5.

As the court below acknowledged, the refusal to reemploy Petitioners did not save the Board any money. Rather, the decision was solely motivated by the desire to punish Petitioners for asserting their statutory and constitutional rights.

Like the plaintiff in Esmail, Petitioners were the victims of vindictive public officials who used their authority to deprive applicants of a government position. This Court should assume jurisdiction and declare that the Equal Protection Clause affords a remedy to the victim of such state conduct.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

By_____
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINION

Sixth Circuit Case Nº. 95-3390
Decided March 6, 1997

Pages A-1 thru A-38

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1997 FED App. 0087P (6th Cir.)
File Name: 97a0087p.06

No. 95-3390

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SALLY ANN VALOT, JEAN HANSEN, ANNA D. ROOSA,
Plaintiffs-Appellants,

v.

SOUTHEAST LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio

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Decided and Filed March 6, 1997

Before: ENGEL, MERRITT, and RYAN, Circuit Judges.

ENGEL, J., delivered the opinion of the court. RYAN, J. (pp. 19-25), delivered a separate concurring opinion. MERRITT, J. (pp. 26-27), delivered a separate opinion concurring in part and dissenting in part.

ENGEL, Circuit Judge. As untenured, substitute bus drivers, Sally Ann Valot, Jean Hansen, and Anna D. Roosa applied for and obtained unemployment compensation for the summer months of 1993 during which they were unemployed, and for that reason, the Southeast Local School District Board of Education declined to rehire them for the next school year. At issue on this appeal is whether the district court erred in granting summary judgment against the bus drivers on their claims that the School Board's decision violated their rights under the federal constitution and in declining to exercise supplemental jurisdiction over their claim that that decision violated Ohio public policy. We affirm.

FACTS

The facts of this case are, in the main, undisputed. Plaintiffs Sally Ann Valot, Jean Hansen, and Anna D. Roosa were substitute school bus drivers in the Southeast Local School District in northern Ohio. Prior to the summer of 1993, they had served in their respective positions for three or more years pursuant to consecutive nine-month contracts, tendered to them by the School Board at the beginning of each school year. Plaintiffs were not employed during the summer months.

As a matter of practice, the School Board voted at the end of each school year not to automatically renew the

contracts of its substitute bus drivers. Instead, the School Board informed them that if they wished to work as bus drivers during the next school year, they should notify their supervisor who would relay this information to the Superintendent of the School Board. The Superintendent would, in turn, make recommendations to the School Board, which would then vote on whether to tender contracts to the recommended substitute bus drivers. As a general matter, the School Board almost always accepted the Superintendent's recommendations.

In the years preceding the 1993-94 school year, Plaintiffs notified their supervisor that they wished to be rehired, received a recommendation from the Superintendent that they be rehired, and were in fact rehired as substitute bus drivers. As they had before, Plaintiffs gave notification to their supervisor at the end of the 1992-93 school year that they wished to be rehired for 1993-94 school year.

Before the summer of 1993, Plaintiffs had never applied for unemployment benefits during the summer months while they were unemployed. Near the end of the 1992-93 school year, however, they became interested in collecting unemployment benefits during the summer months and--because concerned about jeopardizing their being rehired--asked their supervisor for advice. Their supervisor suggested that Plaintiffs speak with the Superintendent, which they did in June of 1993. The Superintendent

indicated that he expected to recommend Plaintiffs for rehire, and while the Board normally followed his recommendations, he could not say for certain what the School Board would do. After their discussion with the Superintendent, Plaintiffs applied for, and received, unemployment benefits.

On August 16, 1993, the Board met to consider, among other things, which substitute bus drivers to rehire for the upcoming school year. Before the meeting, the Superintendent gave the Board a list of the substitute bus drivers whom he recommended for rehire, which included Plaintiffs. However, when it became known at the meeting that they had applied for and collected unemployment benefits during the summer of 1993, the Board became unhappy. Because it does not pay money into the State of Ohio's unemployment fund, the Board pays for any ex-employee's unemployment benefits dollar for dollar. As a result, the Board voted to rehire all of the individuals the Superintendent had recommended except for Plaintiffs. The reason for that decision, Defendants candidly admit, was that Plaintiffs had filed for and obtained unemployment benefits.

When Plaintiffs learned that they had not been rehired, they contacted the School Board for an explanation. The Board told them that they had not been hired because they had sought and obtained unemployment benefits, the receipt

of which translated into loss of the Board's own revenue. Plaintiffs offered to repay to the School Board the benefits that they had received in exchange for being allowed to return to their jobs, but the Board declined.

Following their refusal to rehire Plaintiffs, Defendants changed their policies to ensure that all substitute employees had a reasonable assurance of employment for the following school year, which made those employees ineligible for unemployment compensation under Ohio law. Under Ohio law,

> [b]enefits based on service for an educational institution . . . in other than an instructional, research, or principal administrative capacity, shall not be paid to any individual for any week of unemployment which begins during the period between two successive academic years or terms of the employing educational institution . . . , provided the individual performed such services for the educational institution . . . during the first such academic year or term and, there is a reasonable assurance that such individual will perform such services for any educational institution . . . in the second such academic years or terms.

Ohio Rev. Ann. § 4141.29(I)(1)(b) (Baldwin 1995); *see Knight v. Administrator, Ohio Bureau of Employment Servs.*, 501 N.E.2d 1198, 1201 (Ohio 1986). To bring their hiring practices within the parameters of the "reasonable assurance" language, the School Board subsequently informed substitute employees at the end of an academic term that they would be rehired for the following year.

On February 24, 1994, Plaintiffs filed this five-count suit in federal court against the School Board, individual members of the School Board, and its Superintendent. In counts one to four, they claim violations of their federal constitutional rights pursuant to 42 U.S.C. § 1983: (1) the right to petition for redress of grievances; (2) the right of access to administrative agencies; (3) the right to equal protection of the laws; and (4) the right to due process. In count five, Plaintiffs allege that Defendants violated the public policy of Ohio.

Defendants moved for summary judgment on all counts of the complaint. Plaintiffs cross-moved for partial summary judgment on the issue of liability. The district court granted Defendants' motion and denied Plaintiffs' motion. The court held that Plaintiffs failed "to articulate a clear constitutional right of which they have been deprived." (J.A. at 24.) It rejected their claims for violation of their rights to petition for redress of grievances

and of access to administrative agencies on grounds that they

> never sought access to any court or administrative agency *to redress a wrong or an injustice*, or to otherwise pursue a *grievance*. Rather, they only sought access to a state agency in order to *obtain benefits* due persons who meet certain objective criteria. Any retaliatory action taken by the School Board against the plaintiffs for having sought unemployment compensation benefits did not chill plaintiffs' ability to petition the government for redress of grievances.

(*Id.* at 24-25.)

The court rejected Plaintiffs' equal protection claim on grounds that to the extent the School Board treated substitute bus drivers who applied for and collected unemployment compensation differently from those persons outside that class, the different treatment was not unconstitutional. According to the court, the Board acted in a rational manner to protect the funds used to operate the school system. The court noted that "[i]t is not insignificant that the discrete class plaintiffs single out as having been unfairly treated is a class of persons who obtained unemployment compensation benefits to which they apparently were not entitled." (*Id.* at 25.)

Because it dismissed the federal claims over which it had original jurisdiction, the court declined to exercise supplemental jurisdiction over Plaintiffs' state law claim for violation of Ohio public policy. Plaintiffs' due process claim was rejected without discussion.

Valot, Hansen, and Roosa timely appealed.

DISCUSSION

Plaintiffs' claims on appeal fall into essentially two categories. The first category includes various challenges to the district court's grant of summary judgment against Plaintiffs on their claims under § 1983. The second category includes a challenge to the court's decision not to exercise supplemental jurisdiction over, or grant summary judgment for Plaintiffs on, their state law claim sounding in public policy. In opposition, Defendants contend not only that the district court's decisions were proper on the merits, but also that the individual Defendants are entitled to qualified immunity.

I

We first consider whether the district court erred in granting summary judgment against Plaintiffs on their claims under § 1983. Summary judgment is appropriate where there are no genuine issues of material fact in

dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir. 1993). The district court's grant of summary judgment is reviewed de novo. *City Management Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 250 (6th Cir. 1991). Its denial of summary judgment is reviewed for abuse of discretion. *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1472 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988).

To make out a claim under § 1983, a plaintiff must establish that (1) the conduct complained of was committed by a person acting under color of state law, and (2) that conduct deprived a person of rights, privileges, or immunities secured by the constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *rev'd on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986); *Ellison v. Garbarino*, 48 F.3d 192, 194 (6th Cir. 1995). There is no dispute in this case that in terminating Plaintiffs, Defendants acted under color of state law. At issue is whether, as Plaintiffs contend, Defendants' conduct deprived them of any of their rights under the federal constitution.

Plaintiffs first contend that the district court erred in entering summary judgment against them on their right-of-access claim, under which umbrella they include their petition-for-a-redress-of-grievances claim. Plaintiffs do not contend that they were precluded from applying for unemployment compensation or that they were denied unemployment benefits. Indeed, they both applied for and obtained such benefits. Rather, Plaintiffs maintain that Defendants declined to rehire them in retaliation for their seeking and obtaining unemployment compensation, which, they maintain, is protected by the constitutional right of access.

As the Supreme Court has explained, "[E]ven though a person has no 'right' to a valuable governmental benefit [such as public employment] and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . ." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *see Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977); *Crocker v. Tennessee Secondary Sch. Athletic Ass'n*, 980 F.2d 382, 387 (6th Cir. 1992); *Howland v. Kilquist*, 833 F.2d 639, 644 (7th Cir. 1987); *Littlejohn v. Rose*, 768 F.2d 765, 769-70 (6th Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986).

More to the point here, a claim of retaliation for exercise of the constitutional right of access is cognizable under § 1983. *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 465 (1979); *In re Workers' Compensation Refund*, 46 F.3d 813, 822 (8th Cir. 1995); *Franco v. Kelly*, 854 F.2d 584, 589-90 (2d Cir. 1988); *Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422, 1427-28 (8th Cir. 1986); *see Warmus v. Hank*, Nos. 93-1619/1620, 1995 WL 82061, *10 (6th Cir. Feb. 28, 1995) (unpublished disposition); *Graham v. National Collegiate Athletic Ass'n*, 804 F.2d 953, 959 (6th Cir. 1986) (dicta).

According to Plaintiffs, the right of access that underlies their charge of retaliation is lodged not only in the Petition Clause of the First Amendment--to which the district court appears to have confined its analysis--but also in the Due Process Clause of the Fourteenth Amendment, and the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment.

It is, of course, true, as Defendants acknowledge, and as we recognized in *John L. v. Adams*, 969 F.2d 228, 231-32 (6th Cir. 1992), that the right of access has been traced to various provisions of the constitution. *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 579 (1974) (Due Process Clause); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (Petition Clause);

Douglas v. California, 372 U.S. 353, 355, 358 (1963) (Equal Protection Clause); *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907) (Privileges and Immunities Clause of Article IV).

That does not mean, however, that we must analyze Plaintiffs' right-of-access claim under each of these provisions. In our judgment, Plaintiffs' claim is best viewed as a claim under the Petition Clause, for that provision expressly protects conduct most like the conduct for which Plaintiffs seek protection from retaliation. *See Harrison*, 780 F.2d at 1427 n.7 (finding it more appropriate to view the right of access to the courts as a first-amendment right to petition). Moreover, in our view, the Petition Clause accords their right-of-access claim all the breadth the Constitution affords. Thus, we limit our analysis to that clause.

A cause of action for violation of the Petition Clause is subject to the same analysis applied to a claim arising under the Speech Clause. *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir.), *cert. denied*, 510 U.S. 865 (1993); *Schalk v. Gallemore*, 906 F.2d 491, 498 (10th Cir. 1990); *Hoffmann v. Mayor, Councilmen & Citizens of Liberty*, 905 F.2d 229, 233 (8th Cir. 1990); *Rathjen v. Litchfield*, 878 F.2d 836, 842 (5th Cir. 1989); *Belk v. Town of Minocqua*, 858 F.2d 1258, 1261-62 (7th Cir. 1988); *Gearhart v. Thorne*, 768 F.2d 1072, 1073 (9th

Cir. 1985) (per curiam); *Renfroe v. Kirkpatrick*, 722 F.2d 714, 715 (11th Cir.) (per curiam), *cert. denied*, 469 U.S. 823 (1984); *see Boyle v. Burke*, 925 F.2d 497, 505-06 (1st Cir. 1991) (implied in dicta). *But see San Filippo v. Bongiovanni*, 30 F.3d 424 (3d Cir. 1994), *cert. denied*, 461 S. Ct. 731 (1995).

Specifically, the right to petition is limited to matters of public concern. *See, e.g.*, *Hoffmann*, 905 F.2d at 233; *Rathjen*, 878 F.2d at 841-42; *Gearhart*, 768 F.2d at 1073; *Day v. South Park Indep. Sch. Dist.*, 768 F.2d 696, 703 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986); *Altman v. Hurst*, 734 F.2d 1240, 1244 n. 10 (7th Cir.) (per curiam), *cert. denied*, 469 U.S. 982 (1984); *Renfroe*, 722 F.2d at 715. *But see San Filippo*, 30 F.3d at 440-43.

As the Supreme Court explained in *Connick v. Myers*, 461 U.S. 138, 146 (1983), a particular expression addresses a matter of public concern where it can "be fairly considered as relating to any matter of political, social, or other concern to the community . . . ." The inquiry is made based on by "the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48. Speech does not generally touch on a matter of public concern, as that requirement has been interpreted, where its aim is to air or remedy grievances of a purely personal nature. *See, e.g.*, *Schalk*, 906 F.2d at 495.

While the availability of unemployment compensation is a matter of public concern, Plaintiffs' request for such benefits during the summer months while they were unemployed is far more a matter of private interest than public concern. *See, e.g.*, *White Plains Towing*, 991 F.2d at 1058 (indicating that demands and complaints to police seeking an increase in towing referrals do not touch a matter of public concern); *Hoffmann*, 905 F.2d at 233-34 (same as to grievance pursuant to city personnel rules complaining about dismissal); *Rathjen*, 878 F.2d at 842 (lawsuit protesting demotion); *Day*, 768 F.2d at 700 (grievance about performance evaluation); *Altman*, 734 F.2d at 1244 (encouragement of another officer to appeal her suspension and file suit for retaliation); *Gearhart*, 768 F.2d at 1073 (grievance refuting false charge of ineptitude); *Renfroe*, 722 F.2d at 715 (grievance asserting interest in keeping full-time job). Thus, Plaintiffs cannot make out a cause of action under the Petition Clause and their right-of-access claim must fail.

Even if we were to hold that the right to petition is not limited to matters of public concern, Plaintiffs' right-of-access claim would fail when balanced against Defendants' interests in not rehiring them for seeking unemployment benefits. It is familiar learning that in determining first-amendment rights in the context of public employment, we must undertake to balance "the interests of the [employee

or potential employee], as a citizen, in commenting upon [the subject matter in question] and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563, 568 (1968); *McMurphy v. City of Flushing*, 802 F.2d 191, 197 (6th Cir. 1986). "This balancing is necessary," as the Supreme Court explained in *Rankin v. McPherson*, 483 U.S. 378, 384 (1987), "in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment."[1] *See Board of County Comm'rs v. Umbehr*, 116 S. Ct. 2342, 2347 (1996).

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[1]Relevant considerations include, but are not limited to, "the manner, time, and place of the employee's expression" and "the context in which the dispute arose." *Rankin*, 483 U.S. at 388. Also pertinent is "whether the [petitioning] impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the [petitioner's] duties or interferes with the regular operation of the enterprise." *Id.* "Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest." *Id.* "*Pickering* requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 150.

According to Defendants, their interest in not rehiring Plaintiffs was two-fold: (1) to conserve school district funds--out of which they were required to pay for Plaintiffs' unemployment benefits dollar for dollar--by not employing those substitute bus drivers who would file for unemployment benefits, and (2) to send a message that they would not permit employees to abuse the system. In seeking unemployment compensation, of course, Plaintiffs' interest was none other than to obtain benefits made available under Ohio law as compensation for loss of remuneration due to involuntary total or partial unemployment. Thus, on the one side of scale are Defendants' interests in protecting the Board's fisc and sending a message against abuse of the system, and on the other side of the scale is Defendants' interest in seeking and obtaining unemployment benefits during the summer months, when they were under contract with the Board.

In our view, Defendants' interest in promoting the efficiency of the public service that the Board performs outweighs Plaintiffs' interests in petitioning for unemployment benefits. Defendants' interest in protecting the public fisc is not only legitimate, but also laudable. Protecting the public fisc ranks high among the aims of any legitimate government. Although Plaintiffs offered to pay back the benefits they received, the gesture came only after Defendants declined to rehire them. Thus, Plaintiffs' offer

bears (if at all) only slightly on the Board's prior decision not to rehire them; it does not render the Defendants' decision arbitrary or irrational.

Even if rehiring Plaintiffs would not have imposed short term costs on the Board, it might nevertheless have triggered long term costs, such as its having to pay substitute drivers, including plaintiffs, unemployment benefits for future periods of summertime unemployment. Put another way, while not rehiring Plaintiffs might not have resulted in short term gain to the Board--and may have even resulted in short term loss--it might have resulted in a long term loss to the Board. In not rehiring Plaintiffs, Defendants acted to avoid the risk of such loss. Inasmuch as that risk was reasonably foreseeable, we cannot say that Defendants' efforts to escape it were irrational.

Accordingly, even if we were to recognize the right to petition as applicable to matters of private concern, which we decline to do, Plaintiffs' claim for violation of their right to seek unemployment benefits fails as against Defendants' more weighty interest in interfering with that interest.

B

Plaintiffs next argue that the Board's "refusal to rehire Plaintiffs because they did not forfeit their statutory rights

[to unemployment compensation] is plainly violative of due process." Punishing them for seeking and obtaining that to which they are entitled under state law is, Plaintiffs say, "precisely the form of arbitrary governmental conduct the due process clause was intended to prevent." *Amicus curiae* Ohio Education Association echoes Plaintiffs' position.

In opposition, Defendants argue that Plaintiffs' due process claim cannot be procedural because they "had no property right taken from them," they had a hearing before the School Board, and they stipulated at trial that their claim was for substantive due process. Plaintiffs conceded as much at oral argument, indicating that the only due process claim they advance is substantive in kind, and we limit our due process inquiry to that framework.

Substantive due process "serves as a vehicle to limit various aspects of potentially oppressive government action." *Howard v. Grinage*, 82 F.3d 1343, 1349 (6th Cir. 1996); *see Daniels v. Williams*, 474 U.S. 327, 331 (1986). Substantive due process claims may be loosely divided into two categories: (1) deprivations of a particular constitutional guarantee; and (2) actions that "shock the conscience." *Pusey v. City of Youngstown*, 11 F.3d 652, 656 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 2742 (1994); *Mansfield Apartment Owners Ass'n v. City of Mansfield*, 988 F.2d 1469, 1474 (6th Cir. 1993). Where government

action does not deprive a plaintiff of a particular constitutional guarantee or shock the conscience, that action survives the scythe of substantive due process so long as it is rationally related to a legitimate state interest. *See, e.g.*, *Reno v. Flores*, 507 U.S. 292, 301-05 (1993); *Blue Diamond Coal Co. v. Shalala*, 79 F.3d 516, 521 (6th Cir. 1996); *Galas v. McKee*, 801 F.2d 200, 205 (6th Cir. 1986).

Because Defendants' decision not to rehire Plaintiffs did not deprive them of a particular constitutional guarantee and does not shock the conscience, Defendants' action is subject to rationality review. Under that standard, Plaintiffs bear the burden to show that Defendants' decision was not rationally related to a legitimate state interest. *See, e.g.*, *Blue Diamond Coal*, 79 F.3d at 521; *Kentucky Div., Horsemen's Benevolent & Protective Ass'n v. Turfway Park Racing Ass'n*, 20 F.3d 1406, 1414-15 (6th Cir. 1994). In our judgment, Plaintiffs have failed to meet that burden.

Among Defendants' asserted interests is protection of the public fisc. As noted above, that interest is not only legitimate, but also laudable. Plaintiffs have not, in our view, met their burden to show that Defendants' decision not to rehire them was not rationally related to that interest. Again, that they offered to pay back the unemployment benefits they obtained is not enough to undermine the import of Defendants' interest. In refusing to rehire

substitute bus drivers for whom it was required to pay unemployment benefits, the Board acted rationally to protect against the depletion of its fisc. Thus, Plaintiffs' due process claim must fail.

C

Finally, Plaintiffs argue that the Board terminated them in violation of the Equal Protection Clause. They contend that the district court should have examined Defendants' actions under strict-scrutiny analysis instead of rational-relationship analysis because Defendants infringed on their fundamental constitutional rights. They contend that the Board's decision fails strict scrutiny because it was not narrowly tailored to a compelling state interest; it was the most intrusive means to achieve the Board's goal. Alternatively, Plaintiffs say, the Board's refusal to rehire them fails constitutional muster under rationality review. The Board's actions bear no rational relationship to the asserted interest of protecting public funds, the argument runs, leaving the bare desire to harm an unpopular group, which, of course, is not a legitimate state interest.

Defendants disagree that strict scrutiny applies, reasoning that no fundamental right is at issue. They characterize their actions as creating a class of "those former employees who filed for unemployment benefits between school terms despite their anticipation of being rehired," which

classification, Defendants say, was reasonably drawn to discourage future similar incidents by other employees. Furthermore, Defendants claim that "[e]qual protection was meant to apply to statutory or administrative schemes, not ad hoc decisions of a school hiring authority."

Despite Defendants' claim, it is axiomatic that the Equal Protection Clause applies to more than statutory schemes. *See, e.g., J.E.B. v. Alabama*, 511 U.S. 127 (1994) (applying equal protection analysis to use of peremptory challenges); *Silver v. Franklin Township, Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992) (same as to single decision of zoning board); *Webb v. City of Chester*, 813 F.2d 824 (7th Cir. 1987) (same regarding one-time action of firing police officer because of gender). The question here is not whether the Equal Protection Clause applies, but rather how it applies.

The general rule in equal protection analysis is that state action is presumed to be valid and will be sustained if the classification drawn by the state is rationally related to a legitimate state interest. *See Schweiker v. Wilson*, 450 U.S. 221 (1981). That rule gives way, however, where a state classifies by race, alienage, or national origin, or where a state impinges on personal rights protected by the Constitution; such action is subjected to strict scrutiny and will be sustained only if suitably tailored to serve a compelling state interest. *See McLaughlin v. Florida*, 379

U.S. 184 (1964). Classifications based on gender and legitimacy call for review under an intermediate standard and will fail unless substantially related to a sufficiently important government interest. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (gender); *Mathews v. Lucas*, 427 U.S. 495 (1976) (illegitimacy).

Inasmuch as Defendants' action in this case did not classify Plaintiffs on suspect or quasi-suspect grounds or impinge on a personal right protected by the Constitution, we review that decision for rationality. *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996). For the same reason that Defendants' decision survives rationality review for due process purposes, it passes muster here. Plaintiffs have failed to show that Defendants' decision was not rationally related to a legitimate state interest. Thus, Plaintiffs' equal protection claim must fail.

II

Next, and finally, we consider whether the district court erred in declining to exercise supplemental jurisdiction over Plaintiffs' state law claim. According to Plaintiffs, the court erred in dismissing their state claim for violation of public policy, because their federal claims were properly before it. Moreover, Plaintiffs urge, this Court should enter judgment for them as a matter of law on the claim, as to which they say there is no genuine issue of material

fact and they are entitled to judgment as a matter of law. Defendants answer that the district court properly declined to exercise supplemental jurisdictional over Plaintiffs' state law claim as it properly dismissed their federal claims. They further argue that Plaintiffs failed to state a claim for a public policy tort under Ohio law.

A district court may decline to exercise supplemental jurisdiction over a state law claim where it has dismissed all of the federal claims over which it had original jurisdiction. 28 U.S.C. § 1367(c)(3); *see Taylor v. First of America Bank-Wayne*, 973 F.2d 1284, 1287 (6th Cir. 1992). Its decision not to exercise supplemental jurisdiction in such circumstances is reviewed for abuse of discretion. *Landefeld v. Marion Gen. Hosp., Inc.*, 994 F.2d 1178, 1182 (6th Cir. 1993). Also, as noted above, the court's denial of summary judgment is reviewed for abuse of discretion. *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1472 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988).

As set out above, the district court did not err in dismissing Plaintiffs' federal claims. Thus, it did not err in declining to exercise supplemental jurisdiction over their state law claim on the basis of that dismissal. Accordingly, the court's decision refusing to exercise supplemental jurisdiction is affirmed. Because we hold that the court did not err in denying supplemental jurisdiction, we need not

consider whether it erred in not granting summary judgment for Plaintiffs on their public policy claim.[2]

CONCLUSION

This is not a dispute which has an easy resolution either in terms of constitutional law or for that matter in terms of ordinary fairness. If the Board was in error in believing it should not have to be responsible for payment of unemployment benefits to a person whom it had engaged even in successive years for a period of nine months each year, this was a misconception which appears even to have been shared by the trial court here. In other words, the dispute was not easily resolvable. It is difficult for us indeed to conclude that a board under such circumstances should be precluded from believing that its responsibility to the public fisc was constitutionally forbidden, under pain of being subject to damages if that position should ultimately be in error. Even in hindsight it is not easy to understand the logic of the Ohio statute, which precludes such employees from seeking unemployment compensation where there is an expectation of rehire, and yet requires it where there is no such guarantee. However, it is a matter of the public policy of Ohio not of the United States

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[2]Because we affirm the district court's decision, we need not consider whether the individual Defendants are entitled to qualified immunity.

Constitution. Plainly the Ohio legislature had the right to legislate either to extend or to abolish unemployment benefits altogether should, in its wisdom, it decide to do so. The Board was obviously confused as to the extent of its powers and in that circumstance it simply acted in what it conceived to be an economical and sensible way. On a balancing test, therefore, especially given the fact that going into the controversy there was no guarantee of employment and given the further fact that the plaintiffs in fact received the unemployment compensation which their petitions for redress produced, application of a balancing test must perforce favor the Board. Plaintiffs had the burden of proof and on this basis the trial court properly concluded that they failed. For us to hold to the contrary in such circumstances would be in effect to confer upon the plaintiffs a property right which they knew from the outset was not theirs and would place the federal courts just one step further into the unwanted role of close regulation in what is essentially a matter of state law and discretion.

AFFIRMED.

RYAN, Circuit Judge, concurring. While I come out at the same place my brother Engel does, in concluding that the plaintiffs have not made out their case, I get there following a very different analytical route. I am respectful of my brother's view that there is authority for the idea that the plaintiffs' First Amendment claim may be analyzed under a sort of confluence of petition clause and speech clause principles, involving the "matters of public concern" test. But I think, respectfully, that such an analysis misapprehends the intended meaning of those constitutional guaranties and the proper application of 42 U.S.C. § 1983.

I.

The plaintiffs claim that their statutory right to claim unemployment benefits under Ohio law translates into a fundamental right of access to the courts "and to petition the Government for a redress of grievances" as assured by the First Amendment of the United States Constitution. U.S. CONST. amend. I. Having asserted that they have a fundamental right to seek unemployment benefits, the plaintiffs contend that the School Board's refusal to rehire them, in retaliation for the exercise of their constitutional right to seek unemployment benefits, states a cognizable section 1983 cause of action. In my judgment, they are mistaken.

Section 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983.

As an aside, I note with interest that the plaintiffs have neither pleaded, nor attempted to prove, the existence of a "policy or custom" in the school district to deny the plaintiffs' constitutional rights, a showing that is required by *Monell v. Department of Social Services*, 436 U.S. 658 (1978), to establish "municipal liability." The parties do not seem to think that is a very important point, nor did the district court, so I shall pass it.

As to the plaintiffs' alleged claim of retaliatory discharge for exercising their constitutional right to petition the government, a proper analysis begins with a look at the elements of all claims brought under section 1983. In order to state such a claim, the plaintiffs must establish two things:

1. that defendants deprived them of a federal statutory or constitutional right; and

2. that defendants acted under color of state law.

Searcy v. City of Dayton, 38 F.3d 282, 286 (6th Cir. 1994). As the Supreme Court said in *Albright v. Oliver*, 510 U.S. 266 (1994), the "first step in any such claim is to identify the *specific* constitutional right allegedly infringed." *Id.* at 271 (emphasis added). In my judgment, the plaintiffs have failed entirely to meet this crucial predicate requirement.

Plaintiffs' theory appears to be that the right to file for unemployment compensation is included in or protected by the First Amendment's right to petition for redress of grievances, which, in turn, incorporates the right of access to the courts. I think that argument is circular and meritless. Plaintiffs assume their own conclusion and simply assert repeatedly that their "constitutional right" was violated when the School Board retaliated against them. With the exception of the Third Circuit's *dicta* in *Bradley v. Pittsburgh Board of Education*, 913 F.2d 1064 (3d Cir. 1990), I have found no cases that support such an expansive reading of the right to petition. Most cases discussing the right of access or the right to petition begin the analysis by identifying *the specific constitutional right*

that is the subject of the petition, or whose vindication is sought via access to an adjudicator.

Here, the plaintiffs do not identify any such predicate constitutional right. Certainly there is no constitutional right to receive unemployment compensation, and one cannot be created by bootstrapping the state law right to unemployment compensation to the First Amendment's right to petition. It is clear that the state does not have to provide unemployment compensation. *See Richardson v. Belcher*, 404 U.S. 78, 81 (1971). And even if it chooses to provide the benefit, it can choose to "make substantive changes in the law of entitlement to public benefits" without offending the Constitution. *Id.* It is also clear that whatever property interests plaintiffs may have in obtaining unemployment compensation, the state may freely repeal any legislation that confers that right, and with the repeal, any property interest is extinguished. *Story v. Green*, 978 F.2d 60, 63 (2d Cir. 1992). That being so, there cannot be any constitutionally protected First Amendment right to petition for such benefits. If there were such a constitutional right, nothing short of a constitutional amendment would suffice to repeal the state's unemployment benefits scheme. I find plaintiffs' arguments strained and wholly unpersuasive. In my judgment, applying for unemployment compensation is

simply not a "petition . . . for a redress of grievances" under the First Amendment.

Amici's argument is likewise circular. They begin their analysis by stating that the right to petition the Government for a redress of grievances is clearly protected under the First Amendment; this, of course, is a given. They then proceed to describe at length and in considerable detail the complex structure and procedures comprising the Ohio unemployment compensation scheme. They conclude that because the scheme is in part adversarial, it is protected under the First Amendment's right to petition. Not surprisingly, *amici* cite no support for such a facile creation of a fundamental right. This argument, like the plaintiffs', is simply an effort to bootstrap a state right to a fundamental First Amendment right--an effort supported by absolutely no authority.

I conclude that plaintiffs and their *amici* have failed to identify any constitutional right to serve as a necessary predicate for a section 1983 claim for retaliatory refusal to rehire them as substitute bus drivers.

II.

Plaintiffs also claim that they have suffered a substantive due process violation because they have a fundamental right not to be retaliated against for having sought and obtained

unemployment compensation benefits. However, nowhere do the plaintiffs identify a specific substantive right of which they have been deprived. Instead, they simply assert that the School Board violated their "due process" rights because its conduct was arbitrary, discriminatory, and capricious.

The discussion in the plaintiffs' brief of the "due process" violation they claim to have suffered reveals a complete failure to grasp the distinctions between substantive due process and procedural due process. They cannot be judged too harshly for this shortcoming, given the mess that has been made of this jurisprudence by a number of federal courts, including the Supreme Court. That is the price, I suppose, of attempting to build a jurisprudence on the foundation of a constitutional oxymoron: substantive due process.

Plaintiffs recognize that if they do have a due process claim, it is rooted in the Fourteenth Amendment which states in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. "It follows, then, that if state actors . . . do not infringe on the *life*, *liberty*, or *property* of the plaintiffs, there can be no due process violation." *Whaley v. County of Tuscola*, 58 F.3d 1111, 1113 (6th Cir.) (emphasis added), *cert. denied*, 116 S. Ct. 476 (1995). Plaintiffs do not allege that the interest

of which they have been deprived is found either in the "life," or the "liberty," or the "property" components of the Fourteenth Amendment. Rather, they seem to ground what they repeatedly refer to as their "constitutional right," in the First Amendment, which, of course, is not protected by the Due Process Clause, but rather by the First Amendment itself. *See Graham v. Connor*, 490 U.S. 386 (1989). Where a particular amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Id.* at 395.

Substantive due process protections "have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright*, 510 U.S. at 272. The right to receive unemployment compensation is not a "fundamental" right at all, to say nothing of being of the type traditionally protected by the substantive component of the Due Process Clause. Moreover, the plaintiffs received the unemployment benefits they sought.

Plaintiffs claim they were denied due process because the School Board acted arbitrarily. However, merely to state that the Due Process Clause was "intended to secure the individual from the arbitrary exercise of the powers of

government," which may be freely conceded, does nothing to state a claim under the substantive component of the Due Process Clause. *Id.* (internal quotation marks and citations omitted). "The substantive Due Process Clause is not concerned with the garden variety issues of common law . . . . Its concerns are far narrower . . . . [It] affords only those protections so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Charles v. Baesler*, 910 F.2d 1349, 1353 (6th Cir. 1990) (internal quotation marks and citations omitted).

State-created rights "do not rise to the level of 'fundamental' interests protected by substantive due process." *Id.* This is so because "fundamental" rights "are created only by the Constitution." *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring). Clearly, state-created employment benefits, such as unemployment compensation or the right to a government pension, are not "fundamental" rights created by the Constitution, and therefore they do not enjoy substantive due process protection. *See McKinney v. Pate*, 20 F.3d 1550, 1560 (11th Cir. 1994).

Moreover, it is the *procedural* component of the Due Process Clause, rather than the substantive component, which provides protection from arbitrary government actions. *See Howard v. Grinage*, 82 F.3d 1343, 1349-50 (6th Cir. 1996). Substantive due process refers to

government actions that cannot be undertaken regardless of the procedures used. *Id.; see also Daniels v. Williams,* 474 U.S. 327 (1986).

Since the plaintiffs cannot claim that the right to unemployment compensation is fundamental, their claim has to be that some arbitrary conduct in this case deprived them of "procedural" due process. But the nonarbitrary "process" guaranteed by the Due Process Clause is process suitable to vindicate the denial of an identifiable life, liberty, or property interest. Here, plaintiffs have asserted none. It is well-settled that no procedural duties are implicated when plaintiffs fail to allege an underlying constitutionally protected right. *See Gagliardi v. Village of Pawling*, 18 F.3d 188, 193 (2d Cir. 1994). "The deprivation of a procedural right to be heard . . . is not actionable when there is no protected right at stake." *Id.*

The reality is that the plaintiffs were *not* deprived of unemployment compensation, which is the only arguable protected property interest they have. Rather, they were deprived of being rehired to do their former jobs in which they have *no* protected property interest. *See Ramsey v. Board of Educ. of Whitley County, Kentucky*, 844 F.2d 1268, 1274 (6th Cir. 1988). It is well-settled that when the state deprives an individual of a recognized property interest, it must provide the individual a meaningful opportunity to be heard prior to the deprivation, or in some

cases after. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). But this is not so where the government has deprived the individual of a benefit or property interest that is not protected by the Constitution.

In sum, the plaintiffs have failed to bring their claim within the Due Process Clause, procedural or substantive, because they have not alleged a protected life, liberty, or property interest. Moreover, whatever right they may have under state law, it is clearly not some undefined "fundamental" right that is protected by the Fourteenth Amendment. Plaintiffs have adequate state remedies to seek redress for the wrong they claim to have suffered.

III.

I agree entirely that the plaintiffs have suffered no denial of equal protection of the laws and that the district court did not err in deciding not to entertain plaintiffs' state law claim.

IV.

I join in the **judgment of affirmance**.

MERRITT, Circuit Judge, concurring in part and dissenting in part. The opinions of my colleagues create a direct conflict with the Third Circuit in *San Filippo v. Bongiovanni*, 30 F.3d 424 (3rd Cir. 1995), and misinterpret the elements of a cause of action for the violation of the right of petition clause.

I disagree only with Section I.A. of Judge Engel's opinion which imports into right of petition cases the "public concern" test used in public employee, free speech cases. The right "to petition Government for a redress of grievances" is the last in the list of rights granted in the First Amendment; it was a concept separate from free speech in the minds of the authors of the Bill of Rights.

Plaintiffs have made out a violation of the right of petition clause of the First Amendment. I would follow Judge Louis Pollack's sensible analysis of the right of petition in *San Filippo v. Bongiovanni*, 30 F.3d 424, 442-43 (3rd Cir. 1995), the crux of which is well-stated at page 442:

> But when government -- federal or state -- formally adopts a mechanism for redress of those grievances for which government is allegedly accountable, it would seem to undermine the Constitution's vital purposes to hold that one who in good faith files an arguable meritorious 'petition' invoking that mechanism may be

disciplined for such invocation by the very government that in compliance with the petition clause has given the particular mechanism its constitutional imprimatur.

The basis of my dissent on this point is that this is not a free speech case, and neither was the unemployment compensation case giving rise to the retaliatory discharge. Petitioning a court for redress should not be treated as an exercise in speech. Filing an unemployment compensation action, like hiring a lawyer, eating dinner before making a speech or driving a car or catching a plane to a meeting, is related to speech only marginally. It makes little sense to burden right of petition cases automatically with doctrines from the Speech Clause or the Establishment Clause or the Free Exercise Clause of the First Amendment.

Our case is a "pure petition" case in which the plaintiffs have successfully invoked a statutory right given by the state to public employees. I would follow the reasoning of *San Filippo*. *See Shea, San Filippo v. Bongiovanni: The Public Concern Criteria and the Scope of the Modern Petition Right*, 48 *Vand. L. Rev.* 1697 (1995). The petition clause should not be interpreted to permit retaliation for filing a legitimate unemployment compensation case anymore than it permits retaliation against individuals making legitimate claims for racial, gender or religious discrimination. We do not import the "public concern" test into due process, equal protection or other constitutional

claims. Why do so here? I would therefore reverse the grant of summary judgment to defendants on the First Amendment right of petition theory and require that the case be tried on the merits.

I do not understand my brother Ryan's point. He is certainly right that unemployment compensation is not a federal constitutional right, but no one argues that it is. He is certainly wrong if he is saying a state may punish a citizen for successfully petitioning a governmental agency to gain a benefit (here unemployment compensation) to which he is entitled. The right of petition clause prevents the state from jailing or otherwise punishing vindictively a citizen for applying for welfare benefits or other social services to which he is entitled. The constitutional wrong here is the act of retribution (*i.e.* discharging the plaintiffs) for successfully seeking benefits. Such an act makes ineffective a citizen's right to seek government aid by requesting legitimate official or administrative relief and undermines the right "to petition for a redress of grievances."

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER
[DENYING PETITION FOR REHEARING]

Sixth Circuit Case Nº. 95-3390
Filed April 18, 1997

Pages B-1 thru B-2

Nº. 95-3390

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SALLY ANN VALOT *Plaintiffs-Appellants,*	)	
v.	)	ORDER
SOUTHEAST LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, ET AL., *Defendants-Appellees.*	)	

Filed April 18, 1997

Before: **ENGEL, MERRITT** and **RYAN**; Circuit Judges;

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Merritt adheres to his original dissent but does not request rehearing en banc.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MEMORANDUM & ORDER

Civil Nº. 5:94-CV-0399
filed February 28, 1995

Pages C-1 thru C-14

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SALLY ANN VALOT, et al	:	Case No. 5:94-CV-0399
	:	
Plaintiffs	:	JUDGE O'MALLEY
	:	
v.	:	**MEMORANDUM**
	:	**& ORDER**
SOUTHEAST LOCAL	:	
SCHOOL DISTRICT, et al	:	
	:	
Defendants	:	

Plaintiffs Sally Ann Valot, Jean Hansen and Anna Roosa bring this action against defendant the Southeast Local School District Board of Education ("School Board"), as well as several of the School Board's officers and members.[1] Plaintiffs claim that the School Board's refusal to rehire them as bus drivers was a violation of their rights under the United States Constitution, as well as a tortious violation of the public policy of the State of Ohio.

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[1]The other defendants named in this action are Kelly Westover, David Pettigrew, Charles Honeck, Russell McKenzie, Robert Hedrick, and Terry Byers. All of these individuals are School Board members except Byers, who is the Southeast Local School District Superintendent. As used in this memorandum, the term "School Board" refers to all defendants, except where otherwise indicated.

Defendants have moved for summary judgment on all counts of the complaint (docket no. 22), and plaintiffs have filed a cross motion for partial summary judgment on the issue of liability (docket no. 25). Because the Court finds that defendants' motion is well taken, defendants' motion for summary judgment (docket no. 22) is GRANTED and plaintiffs' cross motion (docket no. 25) is DENIED.

I.

The parties agree that the following material facts in this case are not in dispute. Prior to the summer of 1993, plaintiffs Valot, Hansen and Roosa all served as substitute school bus drivers for the School Board for three or more years. Plaintiffs were employed pursuant to consecutive nine-month contracts tendered to them by the School Board at the beginning of each school year. Plaintiffs were not employed during the summer months.

As a matter of practice, the School Board voted at the end of each school year not to automatically renew its substitute bus drivers' contracts. Instead, the School Board informed its substitute bus drivers that if they wished to work as bus drivers during the next school year, they should notify their supervisor. Their supervisor would relay this information to the school Superintendent, who would make recommendations to the School Board. The School Board would then vote on whether it desired to tender contracts to those substitute bus drivers whom the Superintendent recommended. The School Board virtually always accepted the Superintendent's recommendations.

Each year before the 1993-94 school year, all plaintiffs consistently: (1) notified their supervisor that they wished to be rehired; (2) received a recommendation from the Superintendent that they be rehired; and (3) were in fact rehired as substitute bus drivers. As they had before, all plaintiffs gave notification to their supervisor at the end of the 1992-93 school year that they wished to be rehired for the 1993-94 school year.

Before the summer of 1993, none of the plaintiffs had ever applied for unemployment benefits during the summer months, while they were unemployed. Apparently, no other substitute bus drivers besides plaintiffs had ever applied for unemployment benefits during the summer either. Near the end of the 1992-93 school year, however, plaintiff Valot learned that a substitute bus driver working for a different school system had collected unemployment benefits during the summer months. Valot relayed this information to Hansen, Roosa, and other substitute bus drivers. Valot also learned, however, that another substitute bus driver employed by the School Board had once been warned to relinquish an existing unemployment claim, or lose her job. Plaintiffs thus became concerned that they might jeopardize their own rehiring if they filed a claim for unemployment benefits over the summer. Plaintiffs asked their supervisor for advice, and their supervisor suggested that plaintiffs speak with defendant Byers, the superintendent of the Southeast School System.

Plaintiffs met with Byers in June of 1993. Plaintiffs stated to Byers that they were thinking of applying for unemployment benefits, but wanted to know if doing so would jeopardize their rehiring. Byers responded that he expected to recommend to the School Board that they be rehired, but that he could not predict what the School Board would do. Byers added that the School Board normally followed his recommendations. Plaintiffs thereafter applied for, and received, unemployment benefits.

On August 16, 1993, the School Board met to consider, among other things, which substitute bus drivers to rehire for the upcoming school year. Prior to the meeting, defendant Byers submitted a list of his recommendations to the School Board members. This list originally included plaintiffs. It was made known at the meeting, however, that plaintiffs had applied for and collected unemployment benefits during the summer of 1993. This fact was notable to the School Board because the School Board does not pay money into the State of Ohio's unemployment fund; as a result, the School board, itself, pays for any ex-employee's unemployment benefits "dollar for dollar."

The School Board was unhappy that it had been forced to make unemployment payments for the benefit of plaintiffs. For this reason, the School Board decided not to rehire plaintiffs. Byers crossed plaintiffs' names off of his list of recommended substitute bus drivers, and the School Board then voted to rehire all of the individuals whose

names remained on the list. Defendants candidly admit, under oath, that the only reason the School Board did not rehire plaintiffs for the 1993-94 school year was because plaintiffs had filed for unemployment benefits. Deposition testimony describing the School Board's August 16, 1993 meeting makes it clear that plaintiffs' receipt of unemployment benefits was the sole factor motivating the School Board not to rehire plaintiffs.

When plaintiffs learned that they had not been rehired, they personally contacted the School Board to learn why. The School Board told plaintiffs they had not been hired because they had sought and obtained unemployment benefits, the receipt of which translated into loss of the School Board's own revenue. Plaintiffs offered to repay to the School Board the benefits that they had received in exchange for being allowed to return to their jobs. The School Board refused this offer.

Plaintiffs then filed this lawsuit. In Counts I through IV, plaintiffs claim that defendants violated various of their constitutional rights under color of state law, in violation of 42 U.S.C. § 1983.[2] In Count V, plaintiffs add that

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[2]Specifically, plaintiffs claim that defendants violated the following: (Count I) the right to petition for redress of grievances, secured by the First Amendment; (Count II) the right of access to administrative agencies, secured by the privileges and immunities clause of Article IV and the Fourteenth Amendment; (Count III) the right to equal protection of the laws, secured under the Fourteenth Amendment; and (Count IV) the right to due process of law, secured by the

defendants tortiously violated the public policy of Ohio. Given that the material facts are not in dispute, it is up to the Court to decide whether plaintiffs' claims succeed as a matter of law.

II.

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law....

Rule 56(e) specifies the materials properly submitted in connection with a motion for summary judgment:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein... The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an

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Fourteenth Amendment.

> adverse party may not rest upon the mere allegations or denial of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

However, the movant is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

In reviewing summary judgment motions, this Court must view the evidence in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); White v. Turfway Park Racing Assn., Inc., 909 F.2d 941, 943-44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil cases the Court must decide "whether reasonable jurors could find by a preponderance

of the evidence that the [non-moving party] is entitled to a verdict." Id. at 252.

Summary judgment is appropriate whenever the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 322. Moreover, "the trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact. Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479-80 (6th Cir. 1989) (citing Frito-Lay, Inc. v. Willoughby, 863 F.2d 1029, 1034 (D.C. Cir. 1988)). The non-moving party is under an affirmative duty to point out specific facts in the record as it has been established which create a genuine issue of material fact. Fulson v. City of Columbus, 801 F.Supp. 1, 4 (S.D. Ohio 1992). The non-movant must show more than a scintilla of evidence to overcome summary judgment; it is not enough for the non-moving party to show that there is some metaphysical doubt as to material facts. Id.

III.

Plaintiffs argue that, although they may not have had an absolute right to be rehired, "they had an entitlement not to be denied rehire for an unconstitutional reason." Response Brief at 1. This assertion is generally true. See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (failure to rehire non-tenured teacher in retaliation for teacher's exercise of First Amendment right to publicly criticize school administration was

unconstitutional); Perry v. Sinderman, 408 U.S. 593, 598 (1972) (nonrenewal of non-tenured teacher's annual contract in retaliation for teacher's exercise of First Amendment right to criticize school policy was unconstitutional); Adkins v. Bd. of Educ. of Magoffin County, 982 F.2d 952, 955 (6th Cir. 1993) (firing of non-tenured school secretary because she was married to tenured school principal, who could not be fired, violated secretary's First Amendment right to associate with whom she pleased).

Plaintiffs assert that the School Board's reason for not rehiring them - a retaliation for having sought unemployment compensation benefits - was unconstitutional. Plaintiffs fail to articulate a clear constitutional right of which they have been deprived, however.

Plaintiffs first assert that the School Board's refusal to rehire them infringed upon their constitutional right to petition the government for redress of grievances and their right of access to the courts. It is certainly true that "[t]he right to sue and defend in the courts...is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship." Chambers v. Baltimore & Ohio Railroad Co., 207 U.S. 142, 148 (1907). It is also true that it is unconstitutional for a state official to "take retaliatory action against an individual designed either to punish him for having exercised his constitutional right to seek judicial relief or to intimidate or chill his exercise of

that right in the future." Harrison v. Springdale Water & Sewer Comm'n, 780 F.2d 1422, 1428 (8th Cir. 1986); Graham v. Nat'l Collegiate Athletic Ass'n, 804 F.2d 953, 959 (6th Cir. 1986). And it is established that the right of access to courts to pursue grievances extends to include the right of access to administrative agencies. Franco v. Kelly, 854 F.2d 584, 589 (2d Cir. 1988) ("the right of petition applies with equal force to a person's right to seek redress from all branches of government...In the prison context, we have held that inmates must be 'permitted free and uninhabited access...to both administrative and judicial forums for the purpose of seeking redress of grievances against state officers.'") (emphasis in original; citations omitted).

This law, however, is not helpful to plaintiffs. In this case, plaintiffs never sought access to any court or administrative agency to redress a wrong or an injustice, or to otherwise pursue a grievance. Rather, they only sought access to a state agency in order to obtain benefits due persons who meet certain objective criteria. Any retaliatory action taken by the School Board against the plaintiffs for having sought unemployment compensation benefits did not chill plaintiffs' ability to petition the government for redress of grievances.

Plaintiffs next assert that the School Board's retaliatory action violated their right to equal protection of the laws guaranteed by the Fourteenth Amendment. Plaintiffs claim that the School board treated one class of

individuals - substitute bus drivers who applied for and collected unemployment compensation - differently than they treated individuals outside the class. This argument fails because, to the extent the School Board did treat this class differently, the different treatment was not unconstitutional.

The class that plaintiffs complain was treated disparately by the School Board is not different from members outside of the class based on gender, race, alienage, or national origin. Accordingly, the School Board's action "is presumed to be valid and will be sustained if the classification drawn...is rationally related to a legitimate state interest." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). Here, the School Board had a legitimate interest in protecting the funds used to operate the school system. The School Board had a legitimate interest in protecting the funds used to operate the school system. The School Board's actions were rational, being directed toward protecting those funds from depletion by employees claiming regular, short-term episodes of unemployment. Furthermore, it is not insignificant that the discrete class plaintiffs single out as having been unfairly treated is a class of persons who obtained unemployment compensation benefits to which they apparently were not entitled.[3]

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[3]Ohio Rev. Code § 4141.29(I)(1)(b) states that unemployment compensation benefits for individuals (like plaintiffs) who work for a

Because the School Board's actions toward the discrete class of individuals identified by plaintiffs was rational, plaintiffs' claim that they were denied equal protection fails.

In addition to their claims that the School Board violated their constitutional rights, plaintiffs assert that the School Board tortiously violated the public policy of the state of Ohio. However, subject matter jurisdiction in this case was based on the existence of a federal question. This Court had jurisdiction over plaintiffs' state law claim only because it is so related to their federal law claims that they are part of the same case or controversy. 28 U.S.C. § 1367(a) (defining the court's "supplemental" jurisdiction). Under 28 U.S.C. § 1367(c)(3), a district court may decline

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school in a non-teaching and non-administrative position

> shall not be paid to any individual for any week of unemployment which begins during the period between two successive academic years or terms of the employing educational institution...provided the individual performed such services for the educational institution... during the first such academic year or term and, there is a reasonable assurance that such individual will perform such services for any educational institution in the second of such academic years or terms.

(Emphasis added). In essence, in refusing to rehire plaintiffs, the School Board merely fulfilled the expectations of future employment plaintiffs intimated were theirs when they sought to qualify for unemployment benefits.

to exercise supplemental jurisdiction if the federal claims over which it had original jurisdiction have all been dismissed. "[I]f the federal claims are dismissed before trial,...the state claims should be dismissed as well." United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); Williams v. City of River Rouge, 909 F.2d 151, 157 (6th Cir. 1990). Accordingly, this Court, in its discretion, dismisses plaintiffs' supplemental state law claim, without prejudice, for lack of a substantial federal claim.

IV.

In summary, the material facts in this case are not in dispute, and defendants are entitled to judgment as a matter of law. Because the Court finds that defendants' motion for summary judgment is well taken, defendants' motion for summary judgment (docket no. 22) is GRANTED and plaintiffs' cross motion (docket no. 25) is DENIED.

IT IS SO ORDERED.

\s\ Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SALLY ANN VALOT, et al	: Case No. 5:94-CV-0399
	:
Plaintiffs	: JUDGE O'MALLEY
	:
v.	: **ORDER**
SOUTHEAST LOCAL	:
SCHOOL DISTRICT, et al	:
	:
Defendants	:

For the reasons set forth in this Court's Memorandum and Order of this date the Defendants' Motion for Summary Judgment [Docket #22] is GRANTED and the Plaintiffs' cross motion [Docket #25] is DENIED.

IT IS SO ORDERED.

\s\ Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
AUG 19 1997
CLERK

No. 97-0074

In The

Supreme Court of the United States

October Term, 1996

SALLY ANN VALOT, JEAN HANSEN and ANNA D. ROSSA,

Petitioners,

vs.

SOUTHEAST LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioners' Statement of the Case is adopted by the Respondents.

REASONS FOR DENYING THE WRIT

I.

REVIEW IS NOT PRUDENT. THE FIRST AMENDMENT IS NOT IMPLICATED BY PETITIONERS' CLAIM FOR STATUTORY BENEFITS.

The First Amendment to the Constitution of the United States provides, in pertinent part: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances." In this case, the Respondent School Board did not abridge the right of Petitioners to petition the government for a redress of grievances.

The District Court found that applying to a state agency in order to obtain benefits due persons who meet certain objective criteria is *not* petitioning the government for a redress of grievances. Apdx. C-10. The appellate court below did not reach a *per curiam* opinion on this issue, but Judge Ryan, concurring, recognized that the First Amendment is not implicated in this case because the state law right to unemployment compensation does not implicate the First Amendment's right to petition.[1] Judge Engel bypassed the issue, deciding the case by determining that the Petitioners' claims did not touch upon matters of public concern. Apdx. A-14.

We believe it would be a mistake to accept Petitioners'

1. On the other hand, Judge Merritt without analysis held that the right of petition was at stake. (Apdx. A-30.)

invitation to review the standard for petition cases when this is not a petition case.

The Petitioners at page 9 of their petition argue that there is a conflict in the circuits, specifically that *San Filippo v. Bongiovanni*, 30 F.3d 424 (3rd Cir. 1994), *cert. denied*, 461 S. Ct. 731 (1995), is contrary to the decisions of other circuits. *See* Apdx. A-13. However, this Court denied the petition for writ of certiorari in *San Filippo* (just two years ago). The Petitioners have made no showing why this Court should revisit *San Filippo*.

The instant case would seem a particularly poor choice to revisit *San Filippo*. Only one judge of the appellate court offered an opinion contra *San Filippo*. Apdx. A-13. The decision of the lower court is hardly persuasive, and definitely not binding, authority. "While it was conclusive and binding upon the parties as respects that controversy . . . , the lack of an agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases. . . ." *United States v. Pink*, 315 U.S. 203, 216, 62 S. Ct. 552, 558, 86 L. Ed. 796, 810 (1942).[2]

II.

THIS CASE OFFERS NO NEW ISSUES REGARDING DUE PROCESS.

The Petitioner does not argue that the lower court misapplied the Due Process Clause. Rather, the Petitioners merely argue that the lower court was wrong in holding that the School Board did not act arbitrarily.

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2. We also note that none of the active judges of the lower court requested a vote on the suggestion for a rehearing en banc, which thereby suggests that the lower opinion does not raise compelling issues. Apdx. B-1.

The lower court weighed the interests of the Board and the Petitioners and determined that the Board was not arbitrary under the circumstances. The Petitioners, therefore, are not asking this Court to review the legal standards associated with the Due Process Clause. They want this Court to review the facts and make a finding contrary to the decisions of the two lower courts. The Court should decline the opportunity.

III.

THE COURT SHOULD NOT REVIEW THE PETITIONERS' EQUAL PROTECTION ARGUMENT. THE PETITIONERS HAVE MISCHARACTERIZED THE BOARD'S MOTIVATION AS "PUNISHMENT" OF THE PETITIONERS.

We begin by noting that all three judges below, albeit writing separately, agreed that no equal protection violation occurred. We also vehemently dispute the Petitioners' argument that the School Board wanted to "punish" the Petitioners. Contrary to the Petitioners' assertions at pages 18-19 of their brief, the lower court did *not* find that the School Board merely sought to punish the Petitioners. On the contrary, the lower courts found that the Board was motivated by a desire to protect its "fisc." Apdx. A-16, A-24.

The Petitioners state that they have "an unusual kind of equal protection case" (Petitioners' brief, p. 18), but do not say how their case will further the law of equal protection. The Petitioners seem to be stating that the Board violated equal protection by acting arbitrarily or irrationally. But, the lower courts reviewed the facts and found otherwise. It will not further the progress of the law simply to review these factual circumstances one more time. The Court should therefore decline the invitation.

CONCLUSION

Based on the foregoing, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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